IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.337 OF 2000

Pradeep Ramniklal Bhat,
at present confined in Nasik Road,
Central Jail, Nasik Road,
residing at Flat No.6, Building No.S-A,
Navjivan Housing Society, ...Appellant
Lamington Road, Bombay - 400 008. (Ori.Accused)

Versus

The State of Maharashtra,
at the instance of Narcotics
Cell, Ghatkopar Unit, ...Respondents
under C.R.No.38/92. (Ori.Complainant)

.....

Mr.S.B.Keshwani with Mr.K.M.Sangani for Appellant.

Mr.V.B.Konde-Deshmukh, A.P.P. for Respondents.

.....

CORAM: A.M.KHANWILKAR, J.

SEPTEMBER 12, 2006.

ORAL JUDGMENT :

1. This Appeal takes exception to the Judgment and Order passed by the Special Judge under the Narcotics Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act')

for Greater Mumbai dated March 3, 2000 in N.D.P.S. Special Case No.248 of 1992. The Appellant was charge-sheeted and tried for offence under Section 22 r/w Section 8(c) of the Act and has been found guilty of that offence.

2. In short, the prosecution case is that on 12th August 1992 Police Inspector Suresh Ramchandra Pawar (PW 1) of Narcotic Cell of Ghatkopar received information about the description of the person who was suspected to deal in Mandrax tablets and in furtherance of his design, was expected to arrive near Alfa Medical Store in the evening between 6.00 p.m. and 6.30 p.m. The information so received was reduced into writing and communicated to Deputy Commissioner of Police and arrangement for trap was made at the office. Two independent persons were called to act as panchas. After pre-trap formalities were completed, the raiding party reached near bus stop at Alpha Medical Store when person resembling the description of Appellant/accused was spotted. He was moving in suspicious manner. After observing the conduct of the Appellant for a while, the police party

approached the Appellant and informed their intention to take his search for suspected possession of Narcotics, i.e. Mandrax. He was also informed that he had right to be searched before Gazetted Officer or Magistrate. After necessary formalities were completed, search was taken. It was found that the accused was carrying plastic bag, which contained eight plastic packets consisting of tablets. Some tablets were removed from the said packets and test was conducted on the spot with the help of Kit, which was taken by the police party. The tablet tested positive for Mandrax (Methaqualone). The packets recovered from the plastic bag possessed by the Appellant weighed about 4 kgs. Necessary formality of preparing samples to be forwarded to the Chemical Analyser was also complied with. The Appellant was arrested in connection with possession of contraband item. During the interrogation, on 14th August 1992, Appellant/accused desired to make statement which was recorded in the presence of two independent persons. The Appellant/accused volunteered to point out place of concealment of substantive quantity of Methaqualone tablets. After the

statement was recorded at the instance of the Appellant/accused, police party along with the panchas proceeded to the place as per the instructions of the Appellant/accused being Room No.73, Parmanand Wadi, 25/B Thakurdwar road, Mumbai. The room was found locked. It was opened by the Appellant/accused with the available keys. On entering the room the Appellant pointed out six cardboard boxes containing Mandrax tablets, one icon concealed in wooden box, which were taken charge of. The tablets found were tested on the spot with the help of Kit taken by the Police Officer. The tablets tested positive for Mandrax (Methaqualone). The total weight of the tablets recovered from the said spot at the instance of the Appellant was 99 kgs. Sample from the said bulk was taken for being forwarded to the Chemical Analyser for his opinion. The Chemical Analyser's report was received which indicated the result of analysis as Methaqualone Diphenhydramine Hydrochloride. The Chemical Analyser also indicated the percentage of Methaqualone present in the said samples. After investigation was complete, charge-sheet was filed. The Appellant

was tried by the Special Judge under the Act.

Following charge was framed against the Appellant:

"C H A R G E

I, K.O.Chandiwal, Esqr. Spl. Judge under NDPS Act 1985 for Greater Mumbai do hereby charge you -

Pradeep Ramniklal Bhat

as under :-

FIRSTLY : That you accused abovenamed on 12.8.92 at about 18.15 hours near Bus stop at ALFA Medical Store, V.P.Road, C.P. Tank, Mumbai were found in possession of 4 kgs. of mandrax tablets a psychotropic substance valued at Rs.40,000/- and cash of Rs.225/- in contravention of the provisions of Sec.8(c) of NDPS Act and thereby you have committed an offence punishable u/s.22 r/w 8(c) of NDPS Act 1985 and within my cognizance.

SECONDLY : You accused abovenamed on 14.8.92 led the police at room No.73, 25/B Thakurdwar Road, Bombay and in said room you were found in possession of 99 kg. of mandrax tablets a psychotropic substance valued at Rs.9,90,000/- and one Antiq of Lord Parswhanatha, in contravention of the provision of Sec.8(c) of NDPS Act, 1985, and thereby committed an offence punishable u/s. 22 r/w 8(c) of NDPS Act, 1985, and within my cognizance.

AND I DO HEREBY DIRECT YOU to be tried by me for the aforesaid charges."

3. The prosecution examined seven witnesses.

The prosecution also relied on the documentary evidence such as Chemical Analyser's reports and panchanamas to prove the charges against the Appellant. The Trial Court on analysing the evidence on record found that the prosecution has proved beyond doubt the involvement of Appellant in the commission of the alleged offence and proceeded to convict the Appellant for offence punishable under Section 8(c) r/w Section 22 of the Act and directed the Appellant to undergo sentence of rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/- (Rupees One Lakh), in default of payment of fine, to suffer further rigorous imprisonment for a period of three months.

4. The Trial Court has considered the argument canvassed on behalf of the Appellant about non-compliance of Section 42 and 50 respectively of the Act and rejected the same. However, no argument has been canvassed before this Court on the said issues, as the Counsel for the Appellant fairly accepts that the legal position is now well established and it will not be possible to overturn the opinion recorded by the Trial Court on those

aspects.

5. While questioning the correctness of the impugned decision of the Trial Court, broadly three submissions have been made before me. It was contended that the Chemical Analyser's reports pressed into service by the prosecution will be of no avail. This is so because the prosecution has failed to examine the Chemical Analyser who issued the said reports. It may be mentioned that this contention was canvassed before the Trial Court but the same has been rejected. The second contention canvassed before this Court is that the reports issued by the Chemical Analyser are devoid of material details as to the basis on which the Chemical Analyser came to the conclusion that the articles sent to him for chemical analysis was narcotic drug. In absence of the basic details, the probative value of the reports would be questionable. Even this contention was raised before the Trial Court and has been answered against the Appellant. The third contention raised before me is that, what was seized by the Police was not what was sent to the Chemical Analyser and

for that matter, the reports issued by the Chemical Analyser are not in respect of the samples of items seized by the police from the Appellant and in turn, sent for chemical analysis. These are the only questions which are argued before me and with regard to which both the Counsel have taken me through the relevant record.

6. I shall straightaway consider the first contention raised by the Appellant that non-examination of Chemical Analyser was fatal to the prosecution case. To buttress this submission, reliance was placed on the decision of the Single Judge of our High Court reported in **1992 (1) Bom.C.R. 405 in the case of The State of Maharashtra vs. Jagdish B.Shah**. Emphasis was placed on the exposition made in Paragraph 9 of this decision which reads thus :

> "9. On the question of proof of the Chemical Analyser's Report, Mr.Ganatra advanced certain submissions which I do consider very essential to record. Mr.Ganatra has relied on three decisions of this Court in the cases of (Madholal Sindhu v, Asian Assu.Co.Ltd.), 56 Bom.L.R. 147; (In the matter of

> Mr.D.v.Mr.S.,Advocates), 68 Bom.L.R. 228; and (C.H.Shah v. Malpathak), 74 Bom.L.R. 505. In all of these decisions, this Court has very clearly upheld the principle that the documents sought to be tendered in evidence are required to be proved strictly in accordance with the principles as enunciated in the Evidence Act. This proposition does not have to be re-stated because it is quite elementary. This Court, in the decision reported in the case of (K.T.Rajkotwala v. State of Maharashtra), 1976 U.C.R. (Bom.) 474, has even gone to the extent of elaborating upon the mode of proof and has very clearly specified that the documents must be proved through primary evidence. That the prosecution in the present case has failed to do this in evidence and, consequently, the order of acquittal recorded by the trial Court in these circumstances does not deserve to be interfered with."

7. I am conscious of the fact that it would appear that I am taking inconsistent view with the view expressed in the abovesaid decision. However, there are atleast two good reasons to answer the issue against the Appellant in this case. Firstly, because neither the abovesaid decision nor the three decisions referred to therein have had occasion to consider the efficacy of Section 293 of the Code of Criminal Procedure, 1973 (hereinafter referred to as ‘the Code’). Secondly, my task has been made easier because of the decisions of the

Supreme Court directly on point in issue. I shall deal with those decisions a little later.

8. There is no doubt that provisions of Section 293 of the Code are attracted even in respect of proceedings before the Special Court under the provisions of the Act, by virtue of mandate of Section 36-C of the Act. Section 36-C of the Act stipulates that save as otherwise provided in the Act, the provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor. Thus understood, the regime of Section 293 of the Code will have to be kept in mind while answering the contention raised before this Court about the inadmissibility of the Chemical Analyser's report in evidence. Before I advert to the decision of the Apex Court, I shall advert to the decision of the Division Bench of the Punjab and Haryana High Court in the case of **Bhagwan Dass vs. State of**

Punjab reported in 1982 Cri.L.J.2138. In Paragraph 5 of this decision, it is observed that since the enactment of Section 510 of the old Code, it was clearly settled law that barring cases where there was positive evidence of the tampering of sample, it was not incumbent for the prosecution to examine only or every person in the Office of the Chemical Examiner, who may have had the occasion to handle the sample. In Paragraph 7 of the same decision, it is observed that the statutory provisions seem to attach some sanctity to the report of the Government Scientific Experts including the Chemical Examiner and Assistant Chemical Examiner whose reports are made admissible even without the requirement of their stepping into the witness box unless expressly summoned by the Court. In Paragraph 13, the said High Court has observed thus:

> "13. Learned Counsel for the petitioners then made a vain attempt to fall back on S.45 of the Indian Evidence Act for contending that the report of the Chemical Examiner, as a whole, would not be admissible thereunder. It seems to be obvious that recourse to S.45 of the Indian Evidence Act, in this context, is

> hardly permissible. It was not disputed before us that S.293 of the Code was a special provision which in particular terms made admissible the reports of those Scientific Experts which have been enumerated expressly in sub-sec.(4) of S.293 of the Code. It is obvious that special provisions of S.293 of the Code herein must prevail over the general provisions of the Evidence Act, on the hallowed rule of construction that the special overrides the general. Consequently, the particular provisions regarding the admissibility of the reports of the Chemical Examiner or Assistant Chemical Examiner to Government, provided under S.293 (4) (a) of the Code, are plainly applicable and any document purporting to be the report of such an expert can as a while be used as evidence at the trial. Now once such a report is made admissible by law, it seems to me as wholly hyper-technical to dissect it into different parts and hold certain parts thereof as being out of the ambit of such admissibility."

9. Reference was also made to the decision of the Single Judge of the Andhra Pradesh High Court reported in **1997 (2) Crimes 648 in the case of M/s.Visakha Agro Chemicals (P) Ltd. & Ors. vs. Fertiliser Inspector-cum-Assistant Director of Agriculture (Regular) Visakhapatnam & Anr.** More or less similar contention was considered in the said case with reference to document Exhibit P4 issued by the Fertiliser Quality Control Laboratory,

Hyderabad. In Paragraph 10, it is observed that Certificates issued by the specified Officers in Section 293 of the Code, have to be accepted by the Court as valid evidence without examining the author of those documents. In that case, however, the Court observed that the principle underlying Section 293 of the Code will be of no avail to the prosecution under the Essential Commodities Act, 1955. As is mentioned earlier, there can be no manner of doubt that the argument of the Appellant that non-examination of Chemical Analyser is fatal to the prosecution case and for which reason, the Chemical Analyser's reports though produced on record before the Trial Court, are inadmissible in evidence, will have to be stated to be rejected. For this purpose, it would be apposite to advert to the decision of the Constitution Bench of the Apex Court in the case of **T.Mangaldas Raghavji Ruparel vs. Maharashtra State reported in AIR 1966 SC 128**. In that case, the Court was considering whether the conviction under the provisions of Prevention of Food Adulteration Act could be based solely upon the report of the Public Analyst that the turmeric powder was adulterated. While considering this

point, the Apex Court in Paragraph 9 of its decision made reference to the decision of this Court in the case of State vs. Bhausa Hanmantsa reported in AIR 1962 Bom. 229 and to another decision of Kerala High Court in the case of City Corporation Trivandrum vs. Antony reported in ILR (1962) 1 Kerala 430. After analysing the decision of our High Court, the Apex Court proceeded to observe as follows:

> "It will thus be clear that the High Court did not hold that the certificate was by itself insufficient in law to sustain the conviction and indeed it could not well have said so in view of the provisions of S.510, Cr.P.C. What the High Court seems to have felt was that in circumstances like those present in the case before it, a Court may be justified in not acting upon a certificate of the Chemical Analyser unless that person was examined as a witness in the case. Sub-section (1) of S.510 permits the use of the certificate of a Chemical Examiner as evidence in any enquiry or trial or other proceeding under the Code and sub-s.(2) thereof empowers the Court to summon and examine the Chemical Examiner if it thinks fit and requires it to examine him as a witness upon an application either by the prosecution or the accused in this regard. It would, therefore, not be correct to say that where the provisions of sub-s.(2) of S.510 have not been availed of, the report of a Chemical Examiner is rendered inadmissible or is even to be treated as

having no weight."

10. It may be noted that Section 293 of the present Code is replication of Section 510 of the old Code. The Apex Court has noted in no uncertain terms that if certificate of the Chemical Analyser was placed before the Court, the same is admissible in evidence. Suffice it to observe that the argument that non-examination of the Chemical Analyser would render the said Certificate inadmissible, has been negated in this decision. Indeed, that does not mean that the Certificate so filed on record (u/s 293 of the Code) is a conclusive proof of the fact stated therein. . It is always open to the accused to rebut the position stated in the said certificate. It will be useful to refer to the recent decision of the Apex Court in the case of **State of H.P. vs. Mast Ram reported in (2004) 8 SCC 660**. In Para 6 of this decision, the Apex Court has observed thus :

> "6. Secondly, the ground on which the High Court has thrown out the prosecution story is the report of the ballistic expert. The report of the ballistic

> expert (Ext.P-X) was signed by one Junior Scientific Officer. According to the High Court, a Junior Scientific Officer (Ballistic) is not the officer enumerated under sub-section (4) of Section 293 of the Code of Criminal Procedure and, therefore, in the absence of his examination such report cannot be read in evidence. This reason of the High Court, in our view, is also fallacious. Firstly, the forensic science laboratory report (Ext.P-X) has been submitted under the signatures of a Junior Scientific Officer (Ballistic) of the Central Forensic Science Laboratory, Chandigarh. There is no dispute that the report was submitted under the hand of a government scientific expert. Section 293(1) of the Code of Criminal Procedure enjoins that any document purporting to be a report under the hand of a government scientific expert under the section, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Code, may be used as evidence in any inquiry, trial or other proceeding under the Code. The High Court has completely overlooked the provision of sub-Section 293. What sub-section (4) of Section 293 envisages is that the court is to accept the documents issued by any of the six officers enumerated therein as valid evidence *without examining the author of the documents*." (emphasis supplied)

11. It will be useful also to refer to the exposition of the Apex Court in the case of **Dhananjaya Reddy vs. State of Karnataka reported in (2001) 4 SCC 9**. In that case, the Court was dealing with the report of the Serologist. The

Court observed in Paragraph 39 of the decision that such report can be used as evidence "without any formal proof" under Section 293 of the Code. Even in the case of **Bhupender Singh vs. State of Punjab reported in (1988) 3 SCC 513** in paragraph 13 of the said decision, the Apex Court has observed that report such as Chemical Analyser's report "does not require any formal proof." A priori, there is no manner of doubt that on account of non-examination of Chemical Analyser, the report of the Chemical Analyser does not become inadmissible. The same nevertheless will have to be taken into account by the Court.

12. That takes me to the next grievance made before this Court which grievance was also made before the Trial Court. It is submitted that the Chemical Analyser's reports in the present case are devoid of material details so as to clearly indicate the basis on which the Chemical Analyser reached the opinion noted in the reports that the item which was sent to him for analysis was narcotic drug. This argument is essentially founded on the exposition of the Division Bench of

our High Court in the case of **Nicklaus Peter Heel vs. State of Goa reported in 1998 (2) Mh.L.J. 884**, which dictum has been reiterated in the subsequent decision of another Division Bench in the case of **Dror Taskent & Anr. vs. State of Goa reported in II (1998) CCR 332 (DB)**. Relying on the exposition in this decision, it was contended that the Chemical Analyser's report should have clearly mentioned the grounds or basis for reaching the opinion that the article sent to him for analysis was a narcotic drug. It is submitted that the Chemical Analyser's report should necessarily contain the details of the test experiments or the methods employed by the Chemical Analyser for reaching the said conclusion and the data for forming opinion that the substance sent for analysis to him was contraband and prohibited under the Act. That a bald opinion of the expert, bereft of reasons and grounds, is of no help to the Court and it will be unsafe to record conviction on the basis of such opinion alone. This very contention was raised before the lower Court.

13. In the present case, the lower Court has

answered the issue in three ways. Firstly, it has observed that the Chemical Analyser's reports which have come on record (Exhibits 19 to 22) were trustworthy and could be relied upon. It has then noted that the said reports clearly specify that the articles which were received for analysis by him were sealed and in intact condition and further that the chemical analysis was done which indicated the constituents of the said articles and also specifically gives the percentage of the contents of Methaqualone. The Trial Court has then proceeded to hold that there was other evidence on record to support the prosecution case. Inasmuch as, the discovery of contraband item weighing 99 kgs., which was in conscious possession of the Appellant, kept in concealed manner in a house, has been proved, which evidence was admissible in terms of Section 27 of the Indian Evidence Act. Investigating Officer (PW 1) as well as the panch witness (PW 3) and (PW 7) have spoken about the discovery of the said articles at the instance of the Appellant, which position is reinforced from the Memorandum Panchanama Exhibit 16. The Trial Court has also relied on the evidence of

prosecution witnesses-Investigating Officer Suresh Ramchandra Pawar (PW 1), Panchas- Baban Haribhau Mate (PW 3) and Tanaji Keshav Nigade (PW 7) who have spoken about the fact of recovery of tablets made from the Appellant on 12th August 1992 during the trap as well as discovery of contraband items weighing 99 kgs. at the instance of the Appellant on 14th August 1992. On both these occasions, test was carried out on the spot with the help of testing Kit by the raiding police party and the same tested positive for Mandrax. The Trial Court has also referred to the evidence of Chandrakant Sukhadeo Joshi (PW 5) who is the landlord in respect of the house from where the contraband articles weighing 99 kgs. were recovered at the instance of the Appellant. On this basis, the Trial Court has rejected the argument of the Appellant.

14. On analysing the evidence on record, I have no hesitation in accepting the findings of facts so recorded by the Trial Court. The view taken by the Trial Court is a possible view and

also a correct approach. On this finding, it is not possible to accept the grievance of the Appellant. Reverting to the two decisions which are pressed into service by the Appellant, the exposition in the said decisions will have to be understood in the context of the fact situation of those cases. There can be no doubt that the Chemical Analyser's certificate is not a conclusive piece of evidence as the contents thereof can be rebutted by the accused; and that the probative value to be attached to the Certificate must depend upon a variety of circumstances. Insofar as the case of **Nicklaus Peter Heel (supra)** is concerned, the Court adverted to the contents of the report at page 890 and 891 which read thus :

> "In PW 1/B the Results of the Examination read thus:-
>
> > "Twenty eight pills of Ex-1
> >
> > were analysed by suitable chemical methods. They gave positive test for the presence of L.S.D. The exhibit marked here as Ex-2a1 to 2a8 and Ex-2b1 to Ex-2b4 were analysed by suitable chemical methods. They gave positive test for the presence of charas. Analytical

> report Ex-2 in respect of botanical aspect from Biology division is also attached herewith.
>
> The remnants of the exhibit will be sent separately."

The PW.1/C the Results of Examination read as under :-

> "Characteristic plant parts were detected microscopically in each black material marked 2a-1 to 2a-8 and 2b-1 to 2b-4 respectively and it must be opined that each black material was exudation of the ganja plant."

15. On the basis of these Certificates, the Court went on to observe that the same could not be safely relied to come to the conclusion that the articles recovered from the accused were charas and L.S.D. In the case of **Dror Taskent (supra)**, in the Judgment, the results of examination in Chemical Analyser’s reports have been reproduced, which read thus :

> "The exhibits were analysed by suitable chemical methods. Results obtained in respect of the exhibits are given below:
>
> 1. The exhibit marked at Sl.No.1 of the forwarding note gave positive tests for

> the presence of L.S.D.
>
> 2. Based on chemical and botanical examination of the exhibits marked as 2A, "B and 2C gave positive tests for the presence of Charas. A copy of the botanical report is also enclosed herewith.
>
> 3. The exhibits marked at Sl.No.3 of the forwarding note gave positive tests Thebaine."

16. On analysing the said report, the Court went on to observe that it was a bald statement made that suitable chemical methods were applied by the Analyser without setting out the details of the methods so employed, datas collected and the basis and grounds for reaching the said conclusion. It needs to be noted that in both these cases, "opinion in the reports was the *sole basis*" to proceed against the accused. In the present case, however, I am in agreement with the opinion expressed by the Court below that the reports submitted by the Chemical Analyser (Exhibits 19 to 22) substantially comply with the requirements and would inspire confidence in the mind of the Court. To consider this aspect, we shall straightaway refer to the reports Exhibits 19 to 22. Exhibit 19

reads thus :

"NO.B-(T)/13478 of 92
M.L.Case No.M-361/92
FORENSIC SCIENCE LABORATORY
STATE OF MAHARASHTRA
VIDYANAGARI, BOMBAY 400 098.

Date : 6-10-92

To

The Inspector of Police,
Narcotics Cell, C.B.C.I.D.,
Ghatkopar Unit, Jawahar Road, '
Ghatkopar (E), Bombay-77.

Your letter No.152/92 dated 13/8/92 regarding Eight sealed packets in connection with C.R.No.38/92 under section 8(c)-r/w-21 N.D.P.S. Act 1985 stated by you to have been despatched on 13/8/92 per P.C.No.23764 was duly received in this office on 13/8/92.

Description of parcel/s

Eight sealed packets, seals intact and as per copy sent.

Description of articles contained in parcel/s

Exhibits No.1 to 8 :-

Eight polythene bags each containing 47 off-white coloured tablets, put in eight separate packets marked as 'A-1, B-1, C-1, D-1, E-1, F-1, G-1, and H-1' respectively and labelled 'C.R.No.38/92, U/s 8(c)-21-NDPS Act ...' etc.

RESULTS OF ANALYSIS

Methaqualone and Diphenhydramine Hydrochloride, constituents of Mandrax tablets are detected in Exhibits No.1 to 8. Methaqualone falls under section 2(xxiii) of Narcotic Drugs and Psychotropic Substances Act 1985.

Sd/-
(S.P.KADAM)
Assistant Chemical Analyser to Govt.
Forensic Science Laboratory, Bombay."

. The relevant contents of Exhibit 20 on the letterhead of the Chemical Analyser, reads thus:

"Ref.No.: BT-14666/92
Date : 29-10-92

To,
The Inspector of Police,
Narcotics Cell, C.B.C.I.D.,
Ghatkopar Unit, Jawahar Road, '
Ghatkopar (East), Bombay-77.

Sub : Percentage of active ingredient of the Narcotic drug in the samples in C.R. No.38/92.
(M.L.Case No.M-361/92)

Ref : Your letter No.152/92, Dt.13/8/92.

With reference to above I have to state that the percentage of Methaqualone in the samples in question are as follows :

M.L.Case No.	Exhibit No.	% Methaqualone
M-361/92	1	44.86%

2	44.22%
3	64.56%
4	40.98%
5	53.44%
6	55.44%
7	46.78%
8	41.66%

Sd/-
(S.P.KADAM)
Assistant Chemical Analyser to Govt.
Forensic Science Laboratory."

. Exhibit 21 reads thus :

"NO.B-(T)/13477 of 92
M.L.Case No.M-365/92.
FORENSIC SCIENCE LABORATORY
STATE OF MAHARASHTRA
VIDYANAGARI, BOMBAY 400 098.

Date : 6-10-92

To

The Police Inspector,
Narcotics Cell, C.B.C.I.D.,
Ghatkopar Unit, Jawahar Road,
Bombay.

Your letter No.158/92 dated 17/8/92 regarding Six sealed packets in connection with C.R.No.38/92 under section 8(c) r/w 21 N.D.P.S. Act 1985 stated by you to have been despatched on 17/8/92 per P.C.No.23816 was duly received in this office on 17/8/92.

Description of parcel/s

Six sealed parcels, seals intact and as per copy sent.

Description of articles contained in parcel/s

Exhibits No.1 to 5 :-

Five polythene bags each containing 47 off-white coloured tablets, put in five separate packets marked as A-1, B-1, C-1, D-1 and E-1 respectively.

Exhibit No.6 :-

47 Cream coloured tablets in a polythene bag put in a packet marked as F-1. Exhibits 1 to 6 are labelled C.R.No.38/92, U/s.8(c)-r/s-21 N.D.P.S. Act 1985... etc in regional language.

RESULTS OF ANALYSIS

Methaqualone and Diphenhydramine Hydrochloride, constituents of Mandrax tablet are detected in Exhibits No.1 to 5. Methaqualone falls under section 2(xxiii) of Narcotic Drugs and Psychotropic Substances Act 1985. Diphenhydramine Hydrochloride is detected in Exhibit No.6.

Sd/-
(S.P.KADAM)
Assistant Chemical Analyser to Govt.
Forensic Science Laboratory, Bombay."

. The relevant contents of Exhibit 22 on the letterhead of the Chemical Analyser, reads thus:

"Ref.No.: BT-14665/92
Date : 29-10-92

To,
The Inspector of Police,
Narcotics Cell, C.B.C.I.D.,
Ghatkopar Unit, Jawahar Road, '
Ghatkopar (E), Bombay-77.

Sub : Percentage of active ingredient of the Narcotic drug in the samples in C.R. No.38/92. (M.L.Case No.M-365/92)

Ref : Your letter No.158/92, Dt.17/8/92.

With reference to above I have to state that the percentage of Methaqualone in the samples in question are as follows :

M.L.Case No.	Exhibit No.	% Methaqualone
M-365/92	1	51.94%
	2	48.4%
	3	49.33%
	4	50.69%
	5	52.65%
	6	Nil

Sd/-
(S.P.KADAM)
Assistant Chemical Analyser to Govt.
Forensic Science Laboratory."

16. Adverting to these reports, the Trial Court has rightly noted that the same clearly spelt out the necessary details including the percentage of Methaqualone present in each tablet (sample). There is no doubt that the Chemical Analyser's

reports have been brought on record and exhibited. There was no challenge to these reports. No formal application was moved by the Appellant to issue summons to the Chemical Analyser for challenging the opinion or the contents of the reports. Keeping this in mind, the Trial Court referred to the decision of the Division Bench in the matter of Alice Norman vs. Narcotic Central Bureau reported in 1997 VL-J-I Bom. 1 as well as the unreported decision of the Division Bench of our High Court in Criminal Appeal No.643 of 1995 decided on 19.2.1996 wherein, it was observed thus:

> "We are unable to accept the submission as canvassed undisputedly Exhibits 61 to 67 are reports of the expert which are admissible in evidence in view of Section 293(1) of Code of Criminal Procedure. The Section further provides that the Court can call the expert for examination in case of any doubt. Undisputedly in the present case the report of the expert has been accepted during the trial without there being any demur. The defence has not applied for examination of the experts. Even otherwise the trial safely proceeded on relying upon the report. Now it would not be open for the defence to turn found found and suggest that the report is not admissible for want of certain data of analysis. To discard a report on the ground of illegal deficiency or requirement would be derogatory to the

> scheme of Section 293 of Criminal P.C. itself. We are, therefore, unable to accept the submission of Mr.Pathak in this behalf." (emphasis supplied)

17. The decision in the case of **Nicklaus Peter Heel (supra)** has been held to be not applicable by the Trial Court on such analysis. The Trial Court then proceeded to hold that the Chemical Analyser's reports in the present case with percentage of active ingredients of Methaqualone, leaves no manner of doubt about the presence of Methaqualone in the tablets.

18. The learned Assistant Public Prosecutor has placed reliance on the decision of Single Judge of our High Court in the case of **Prabhakar Dhondiram Waghchaure vs. State of Maharashtra reported in 2006 All M.R. (Cri.) 1664**. In Paragraph 10 of this decision, it is observed that it is not possible to accept the submission made by the Appellant therein that on account of non-examination of the Chemical Analyser, no reliance can be placed on his report as there was no evidence to indicate the manner in which the

sample was tested in the laboratory particularly in view of the fact that the Chemical Analyser's report was admitted by the defence in the Trial Court. The Court has also accepted the argument of the prosecution in that case that it was not open to challenge the Chemical Analyser's report and that, if the accused had challenged or objected to that report, the prosecution would have examined the Chemical Analyser. Here, I may mention that the Appellant, relying on the observation made in Paragraph 11 of the same decision, would contend that it was obligatory on the prosecution to prove beyond reasonable doubt that samples were taken out from the seizure made from or at the instance of the Appellant and the same samples were sent to the Chemical Analyser and after the same were properly tested after following the procedure and qualitative test by suitable chemical methods, the results thereof were obtained. Unless all these relevant facts are established by the prosecution beyond reasonable doubt, there was no occasion for the Appellant to challenge the Chemical Analyser's reports. It was argued on behalf of the Appellant that the weakness in the defence cannot be the

basis to convict the accused. The prosecution will stand or fail on the basis of its own evidence. The argument seems to be attractive. However, the same is devoid of merits. The Chemical Analyser's reports are also a piece of evidence that has to be considered by the Court. In the present case, besides the Chemical Analyser's report, the prosecution has proved relevant facts to establish that during the trap, seizure was made from the Appellant. Samples were taken out from the said seizure and sealed by following necessary procedure. What is important to note is that not only the Investigating Officer but also the panch witnesses have deposed that the police carried out test on the spot with the help of Kit of the tablets from the bulk of tablets and the test indicated positive for Mandrax. The spot panchanama drawn also refers to this fact. However, in the entire cross-examination of any of these witnesses, there is no challenge whatsoever to these facts. Reference can be usefully made to the decision of the Apex Court in **Kalema Tumba vs. State of Maharashtra & Anr. reported in (1999) 8 SCC 257**. In Paragraph 5 of this decision, similar

grievance was considered. In that case, it was argued that the report which was given by the Chemical Analyser was a cryptic report, for which reason, no reliance could be placed upon it. It was submitted that as the report did not contain details of the test, it had no evidentiary value. That argument has been negatived by the Apex Court on two grounds. The first reason recorded is that the accused himself had admitted in his statement under Section 108 of the Customs Act that the seized item was heroine. What is relevant for our purpose is the second reason taken into account by the Apex Court that, in that case, the evidence of the Officers of the Narcotic Control Bureau also, who had tested the substance found from the Appellant, speaks about the substance having tested positive during such test. Even in the present case, the witnesses have deposed that the seized articles were tested on the spot with the help of the Kit in the presence of panchas, which tested positively for Mandrax. That evidence has remained unchallenged.

19. As mentioned earlier, the prosecution has

established the fact that the samples were taken from the bulk of articles seized and were properly sealed and forwarded to the Chemical Analyser. The Chemical Analyser's reports indicate that the packets received for analysis were in respect of the case on hand and in sealed and intact condition. It also indicates that the chemical analysis of the samples was done. The result of chemical analysis has been mentioned in the reports. The Chemical Analyser has also reported the percentage of Methaqualone found in the samples. This evidence has gone unchallenged. I am therefore in agreement with the conclusion reached by the Trial Court that taking overall view of the matter, and from the evidence which has come on record, the prosecution succeeded in establishing the relevant facts to indicate the complicity of the Appellant in the commission of the crime in question.

20. In other words, I find no substance in the argument that the reports in question issued by the Chemical Analyser, will have to discarded being devoid of material details on the basis of which he

came to the conclusion that the articles received by him for analysis was narcotic drugs. Learned Prosecutor had then relied on another decision of the Single Judge of this Court in the case of **Venugopal Jaj Reddy & Ors. vs. State of Maharashtra reported in 2006 All.M.R. (Cri.) 387**. In Paragraph 8 of this decision, it is observed that it is no doubt true that the prosecution has not examined the Chemical Analyser but has produced the report of the Chemical Analyser. The Court has also adverted to the argument that non-examination of the Chemical Analyser was fatal. The Court, however, went on to observe that it is no doubt true that it was the duty of the prosecution to have examined the Chemical Analyser in order to establish that he had conducted number of tests before coming to the conclusion that what was found in the packets was ganja and not any other substance. However, it is then observed that non-examination of the Chemical Analyser can be used as additional factor in favour of the accused, if it is found that there is no additional corroboration through independent witnesses to prove the seizure of the contraband from the

possession of the Appellant/accused. Relying on these very observations, Counsel for the Appellant would contend that in the present case, the prosecution has failed to examine the Chemical Analyser. I have already answered this grievance relying on the decisions of the Apex Court that it was not necessary for the prosecution to examine the author of the Chemical Analyser's report. The said document, nevertheless, is required to be looked into, in view of the provisions of Section 293 of the Code. In the present case, I have also affirmed the opinion of the Trial Court that the Chemical Analyser's reports in question were sufficient to proceed against the Appellant; In any case, there was other independent evidence on record to support the prosecution case that the items recovered from the Appellant or at his instance were contraband items. In the case of **Venugopal Jaj Reddy (supra)**, the Court eventually proceeded to allow the Appeal on the reasoning that there was non-compliance of Section 42 and Section 50 of the Act. That is not the argument available to the Appellant in the present case.

21. The Public Prosecutor also relied on the decision of the Apex Court in the case of **Jagdish Budhroji Purohit vs. State of Maharashtra reported in Supreme Court Judgments on Narcotic Laws at page 126 (AIR 1998 SC 338)** while dealing with the third submission, which I will refer to a little later. In Para 3 of this decision, similar argument was canvassed before the Apex Court. The admissibility of reports Exhibits 61 to 67 was challenged and in the alternative it was argued that no weight should be attached to the said reports as they did not contain any data regarding the test applied by the Chemical Examiner for finding out the contents of the samples examined by him. The Apex Court proceeded to record that the Exhibits 61 to 67 did show that a qualitative test was followed by the Chemical Examiner and Methaqualone was found in the samples examined by him. Even in the present case, the reports refer to the fact that chemical analysis was done and the observations thereof have been noted. Moreso, the percentage of contents of Methaqualone has been specified. Even in that case, besides the reports, prosecution led evidence of PW 1 and PW 3 who were members of the raiding

party. The said witnesses deposed that they had carried with them a Kit for the purpose of testing when they had raided the factory and on analysing the powder in the factory, it was found to be Methaqualone and the tablets were found containing Methaqualone. Counsel for the Appellant, however submits that in that case the Court accepted the evidence of PW 1 and PW 3 who were the members of the raiding party as they had specifically deposed that they had received sufficient training for carrying out such tests and had sufficient knowledge about narcotic substance and the methods of testing. However, in the present case, no such evidence is forthcoming. It was contended that when the established legal position obligates compliance of certain matters to be stated in the Chemical Analyser's report to be used under Section 293 of the Code but also to be spelt out in the evidence of the Chemical Analyser, if examined, the prosecution cannot be placed on higher pedestal when the Chemical Analyser is not examined and the opinion regarding analysis done is sought to be established by other independent evidence. It was argued that in such a case, the evidence of

Investigating Officer (PW 1) should necessarily spell out all the material details and not merely his opinion that the items seized was tested to be a contraband item. In absence of such details, the evidence of the Investigating Officer will be of no avail. Indeed, the Appellant may be justified to the limited extent that PW 1 has not clearly stated that he had received sufficient training and had sufficient knowledge about narcotic substances and the methods of testing. Nor this witness has deposed about the nature of tests carried out and the relevant data furnished to support his opinion that the tablets contained Methaqualone. However, the totality of the evidence will have to be kept in mind while considering the matter, which was the correct approach adopted by the Trial Court. In the present case on analysing the Chemical Analyser’s reports, on its own, as also on the basis of independent evidence, the view taken by the Trial Court, to me, appears to be a possible view. The Chemical Analyser’s reports, by itself, would be sufficient to proceed against the Appellant. In any case, the opinion of PW 1 arrived at after the test was conducted, is

corroborated by the contents of the Chemical Analyser's reports. There is absolutely no challenge to these aspects in the evidence at all and the same is unshaken. If so, the reason which weighed with the Apex Court in **Kalema Tumba's Case (supra)** in Paragraph 5 will apply to the case on hand. Moreover, the fact that the Appellant led to the recovery under Section 27 of the Indian Evidence Act which turned out to be contraband item weighing 99 kgs. kept in concealed manner in the house in possession of the Appellant, has been established in the evidence of Investigating Officer (PW 1), Panchas (PW 3) and (PW 7) and corroborated by the memorandum Exhibit 16.

22. Suffice it to observe that taking the totality of the circumstances into account, which have been established from the record and not challenged by the defence, it would follow that the Chemical Analyser's reports (Exhibits 19 to 22) pressed into service by the prosecution cannot be thrown out being bereft of material details as to the basis on which the Chemical Analyser came to the conclusion that the items were contraband items

as contended. In this behalf, reference can be usefully made to the observations of the Apex Court in the case of **Bhupender Singh (supra)**. In Paragraph 12 of this reported decision, similar argument was raised on behalf of the accused. It was argued that it was not enough for the Chemical Analyser merely to state in his report that the organo-phosphorus compound was present in the substance sent to him for examination. He should have also stated that a lethal dose of organo-phosphorus compound was detected in the substance sent to him. That his report should be full and complete to take the place of evidence, which he would have given if he were called to Court as witness. In the absence of such particulars, the death by poisoning cannot be inferred. To support the said argument, reliance was placed on two decisions of Allahabd High Court before the Apex Court in the case of Mt.Gajrani vs. Emperor (AIR 1933 All 394) and State vs. Fateh Bahaddur (AIR 1958 All 1). The Apex Court analysed both these decisions. It observed that in the first case it was held that it was not enough for the Chemical Analyser merely to state his opinion,

but he must also state the grounds which formed the basis of his opinion. The Apex Court analysed the second case where the case was of death by arsenic poisoning. The Allahabad High Court was of the view that the Chemical Analyser did not state the quantity of arsenic poison found in the viscera of the deceased and that whether it was fatal or not. The observations so made by the High Court have been held to be obviously in the fact situation of the respective case. In paragraph 13, the Apex Court went on to observe that such observations cannot be taken as rigid statement of law. No hard and fast rule can be laid down as regards the value to be attached to the report of the chemical examiner. It has then observed that Section 293 of the Code provides that the report of the scientific experts may be used as evidence in any inquiry, trial or other proceedings of the Court. The Court has then observed that such report, by itself, is not crucial. It is a piece of evidence. That the only protection to it is that it does not require any formal proof. Accordingly, even the second submission canvassed on behalf of the Appellant does not commend to me.

23. That takes me to the third submission canvassed before me. It was argued that the prosecution has not been able to establish that what was seized was not what was sent to the Chemical Analyser and for that matter, the report sent by the Chemical Analyser pertain to samples not received by him (or relating to some other case). Even this aspect has been considered by the Trial Court and answered against the Appellant on analysing the evidence of PW 1, PW 3, PW 4 and PW 7. The Trial Court has found that the tablets were recovered from the Appellant and at the instance of the Appellant, samples were drawn therefrom (bulk article) and the same was forwarded to the Chemical Analyser in sealed packet which was received by the Chemical Analyser intact, as is also evident from the reports of the Chemical Analyser. The Chemical Analyser, on analysing the said samples, submitted his reports which clearly mentioned that the samples received and tested were in connection with the present case. There is no reason to doubt the correctness of this conclusion reached by the Trial Court. Counsel for the Appellant, however, placed

emphasis on panchanama Exhibit 12 which mentions the colour of the contraband as gray colour, whereas, in the report of the Chemical Analyser, the colour of the sample has been mentioned as off-white colour. Reliance is then placed on Para 44 of the cross-examination of PW 1. It is stated by PW 1 that he cannot explain as to why the column of withdrawal of any property is not filled in, if the property is withdrawn from the store room. He has stated that the seized property was deposited at head office by him and PSI Lugde. He has then stated that whenever any muddemal property is stored with the department, Officer obtains a receipt That the Muddemal Register though indicates about the sample packets earmarked for chemical analysis, however, there is no tick mark against such packets, which according to PW 1 indicated that they are not shown in the muddemal room. He has then stated that the tick mark on the muddemal is by the concerned clerk of the store room. He has stated that he cannot explain as to why there is no entry in the column of deposit of remnant packets. He has then stated that he cannot tell whether any entry was made when he had received

remnants of sample from the Chemical Analyser, as he was transferred in September 1992. Suggestion was given to him that he was giving false evidence, which has been denied. In my opinion, it is not possible to read paragraph 44 of the cross-examination of PW 1 in isolation. The evidence will have to be read as a whole. If so read, it is noticed that this witness has deposed that after the samples were drawn from the bulk article and sealed, the same sample packets were forwarded to the Chemical Analyser along with the forwarding letter. The forwarding letter has been proved and marked as Exhibit. The said letter and the samples were carried by the prosecution witness, who has been examined. That witness has deposed that the sample packets which were given to him to be delivered to Chemical Analyser's office were in sealed and intact condition. The same were duly delivered in the office of the Chemical Analyser. The Chemical Analyser's report also establishes the fact that samples were received in sealed packet and intact condition on the relevant dates. This prosecution evidence has remained unchallenged. There is no cross-examination

whatsoever with regard to this part of the evidence. It will be apposite to refer to the decision of the Apex Court in the case of **Ashok Kumar vs. State of Haryana reported in (2000) 2 SCC 592**. In Para 9 of this decision, the Apex Court considered the argument of the accused that there was no reliable evidence to prove that the samples seized from the accused were same as were analysed by the Chemical Analyser. That contention has been rejected by the Apex Court on the reasoning that the report of the Chemical Analyser clearly establishes that the articles examined by him were the articles connected with this case. In the present case, I have already recorded that opinion, inter alia, having regard to the Chemical Analyser's report. The Apex Court in that case then went on to observe that neither the report of the Chemical Analyser was challenged nor was any application given for examining him as a witness to establish that the seal from the samples were faint when received by him and it was not possible to say whose seals they were. Even in the present case, no such application has been moved by the Appellant/accused. As noted earlier, the Chemical

Analyser's reports have gone unchallenged during the trial. In the circumstances, even this argument will not take the Appellant any further.

24. The Assistant Public Prosecutor has rightly pressed into service observations of the Apex court in the case of **Jagdish Budhroji Purohit (supra).** In Paragraph 4 of this reported case, similar contention was considered by the Apex Court. It was argued that the substance which was seized from the factory and sent by the Investigating Officer to the laboratory was of "white colour" but the reports of the Chemical Analyser noted the samples examined by him of "grey colour". The Apex Court rejected this contention by observing that the evidence establishes that the samples were received by the Chemical Analyser in a sealed condition and they were intact. The samples were in a fit condition for testing. On this finding, the Court proceeded to hold that it leaves no doubt about the material seized from the factory and examined by the Chemical Analyser being the same. The principle stated in this decision would apply to the fact situation of the present case as

well. Accordingly, there is no substance even in the last submission canvassed on behalf of the Appellant.

25. For the aforesaid reasons, this Appeal is devoid of merits. The same should fail. Hence, dismissed.

A.M.KHANWILKAR, J.